effectively with both internal plant personnel and the external contacts required." App. 31a, emphasis added by Petitioner.

In the first quarter of 2001, 3M Management located in Austin, Texas, directed the 3M Columbia management staff to identify salaried employees that were redundant and could be eliminated. App. 32a-33a.

Stidham's supervisor, Larry Wall, determined which positions were "redundant" by looking at the positions and trying to see what would happen if he cut them. App. 34a. He only seriously considered cutting three positions. App. 35a. These positions were for Stidham; age 50, Paul Blakemore; age 50, and C.J. Welch; age 46. App. 22a, 37a-38a. There were six salaried employees **outside of the protected class** which were under Wall's control who were never considered or evaluated for being redundant. App. 22a. The decision to cut employees was not based on merit or employee performance. App. 35a. Wall did not perform any ranking to determine which positions under his supervision were most redundant. App. 35a.

3M was required by contract to offer Stidham a job in labor at an hourly rate in lieu of termination. Stidham's old job that she had performed 21 years earlier was no longer available after the downsizing at 3M. Stidham was offered a rehire into an hourly labor position so long as the collective bargaining agreement allowed her to have that job based upon her seniority. At any rate, Stidham was faced with a choice: accept an hourly labor position at less than half her salary as a manager, or be terminated. App. 41a.

After Stidham was terminated, the majority of her job duties were performed by Rebecca Hyde. App. 40a. Hyde is in her late twenties or early thirties. App. 40a. Stidham's

other duties which involved refrigerant containment were transferred to Terry Smith. App. 43a. Smith is eight years younger than Stidham. App. 22a.

As an alleged "reduction in force" 3M eliminated a total of 16 employees from its salaried staff on April 23, 2001. Of the sixteen employees eliminated, 15 were over the age of 40. App. 44a. Prior to the reduction in force, there were 182 salaried employees. Of this number 70 were aged younger than 40 years. There were 112 salaried positions held by persons over the age of 40. Had the selection been a random one, statistically it would have been expected that approximately ⅓ of those terminated would be outside the protected class. Instead, only one person under the age of 40 was terminated in the reduction in force. App. 45a.

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted because the Eighth Circuit decision conflicts with the decisions of other United States Courts of Appeal on the issue of what is required to establish a *prima facie* case under the ADEA.

The entry of summary judgment by the trial court was affirmed against Stidham because the Eighth Circuit Court of Appeals held that Stidham had not established her *prima facie* case. The Court in Stidham stated, "It is undisputed that Stidham can establish the first three elements of her *prima facie* case. The dispute arises under the fourth element - whether she can show some additional evidence that age was a factor in her demotion." App. 5a.

The requirements for establishing the fourth element of the *prima facie* case in a reduction in force situation have been the

focus of controversy in most of the circuits. The circuits are generally divided into two camps. The Second, Third, Seventh, and Tenth Circuits focus on whether the terminated employee's job duties were subsequently performed by a younger individual and whether the employer retained individuals outside of the protected class after the reduction in force. Those Circuits avoid establishing an additional *prima facie* showing of some conduct on the part of the employer that establishes intent to discriminate.

On the other hand, the Sixth, Eighth, and Eleventh Circuits have placed an additional burden on plaintiff at the *prima facie* stage of the case requiring that she provide proof that the employer intended to discriminate on the basis of age in making its employment decision. In the Eighth Circuit, it is not enough that plaintiff establish that a younger individual was retained who took over her job responsibilities. The Eighth Circuit requires additional evidence of discrimination in a reduction in force case beyond the *prima facie* showing required in other circuits.

In order to establish a *prima facie* showing in a reduction in force case, the Eighth Circuit requires as a fourth element that plaintiff come forward with some additional evidence that age was a factor in the employer's action. ***Bashara v. Blackhills Corporation,*** 26 F.3d 820, 823 (8th Cir. 1994). The Eighth Circuit specifically rejects the possibility that plaintiff can make her *prima facie* case by establishing that a younger person was retained who assumed the job responsibilities of the older, displaced worker. App. 8a.

The Court in Stidham states that the plaintiff must establish the fourth element of her *prima facie* case by coming forward with "some additional evidence that age was a factor in her demotion." App. 5a. This language indicates that as

long as plaintiff comes forward with some evidence that age was a factor, she would make a *prima facie* case. However, according to the Eighth Circuit, it is not simply *some* evidence that age was a factor. Plaintiff is required to establish an inference of age discrimination. App. 7a-8a. The Eighth Circuit requires a plaintiff to show discriminatory intent by the employer at the *prima facie* stage of the case. This is more explicitly stated in ***Hanebrink v. Brown Shoe Co.,*** 110 F.3d 644, 646-47 (8th Cir. 1997): "The district court correctly concluded that these facts are not of a sufficient 'kind and degree' to raise an inference that age was the motivating factor in Mr. Hanebrink's discharge."

The Eighth Circuit requires a plaintiff to come forward with evidence that age was the motivating factor in the decision or plaintiff loses at the *prima facie* stage of her case. The Eighth Circuit has established a significantly higher burden on plaintiffs than have other circuits in order to establish a *prima facie* case.

In ***Marzano v. Computer Science Corp.***, 91 F.3d 497, 502 (3d Cir. 1996), the Third Circuit held that the standard for establishing a *prima facie* case in reduction-in-force situation requires plaintiff to show: 1) she was in a protected class, 2) she was qualified for the position, 3) she was laid off or terminated, and 4) other unprotected workers were retained. The District Court in ***Marzano*** had, by its own admission, rejected the literal language of the retention requirement. ***Id.*** The same is true in Stidham's case.

The Third Circuit reversed the district court in ***Marzano*** based upon the District Court's use of "this novel standard" which required plaintiff to produce some additional evidence that age was a factor. ***Id.*** The Third Circuit also held that the fourth prong should be relaxed when there is a reduction in

force; therefore, the plaintiff does not have to show she was replaced by a younger person; rather it is sufficient for her to show she was discharged, while the employer retained someone outside the protected class. ***Id.*** at 503. As the Court states in ***Marzano***:

> In a further effort to fine-tune our jurisprudence on the subject, we have held that the fourth prong of the *prima facie* case should be "relaxed" when the employee's layoff occurred in the context of reduction in force. ***Torre*** [***v. Casio, Inc.***], 42 F.3d [825], 831 [(3d Cir. 1994)]. In such a situation, "it obviously is unnecessary for the plaintiff to... show that he was actually replaced by" someone outside the protected class. ***Massarsky*** [***v. General Motors Corp.***], 706 F.2d [111], 118 n. 13; ***see also Duffy v. Wheeling Pittsburgh Steel Corp.***, 738 F.2d 1393, 1395 n. 3 (3d Cir.) (same), *cert. denied*, 469 U.S. 1087 (1984). Rather, "it is sufficient to show that he was discharged, while the [employer] retained someone [outside the protected class]." ***Healy v. New York Life Insurance Co.***, 860 F.2d 1209, 1214 n. 1 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); ***see also DiBiase v. SmithKline Beecham Corp.***, 48 F.3d 719, 723 n. 2 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); ***Torre***, 42 F.3d at 831; ***Armbruster*** [***v. Unisys Corp.***], 32 F.3d [768,] 777; ***Billet v. CIGNA Corp.***, 940 F.2d 812, 816 n. 3 (3d Cir. 1991); ***Duffy***, 738 F.2d at 1395 n. 2; ***Massarsky***, 706 F.2d at 118.

Marzano, 91 F.3d at 503-04 (parallel citations omitted).

According to the Third Circuit, in a reduction in force case plaintiff must show as part of the fourth element that the employer retained someone similarly situated to him who is

sufficiently younger. ***Anderson v. Consolidated Rail Corp.***, 297 F.3d 242, 250 (3d Cir. 2002); ***Showalter v. University of Pittsburgh Medical Center,*** 190 F.3d 231, 234 (3d Cir. 1999).

The Third Circuit rejected the additional evidence requirement "because it subverts the entire analytical framework constructed by the U.S. Supreme Court, this Court and other circuits for the consideration of summary judgment motions in employment discrimination cases." ***Marzano,*** 91 F.3d at 507.

> To require plaintiff to produce "additional evidence" of discrimination at the *prima facie* stage, as the district court did in this instance, would be a cure worse than the disease. It would topple the complex evidentiary edifice constructed by the Supreme Court, and impose on plaintiff the very burden that ***McDonnell Douglas*** sought to avoid – that of uncovering a smoking gun.

Id. at 510.

This Court established in ***McDonnell Douglas Corporation v. Green,*** 411 U.S. 792 (1973), the analytical framework for cases involving employment discrimination where plaintiff seeks to make her case through circumstantial evidence:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this

> burden, the plaintiff must then have an opportunity to prove by preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), citing ***McDonnell Douglas,*** 411 U.S. at 802, 804.

This Court developed the burden shifting framework in recognition of the fact that it is the intent behind the employer's action that gives rise to liability. This Court has noted that for obvious reasons it is extremely difficult, if not impossible, to establish directly the motivation of one's employer. ***See U.S. Postal Service Bd. of Governors v. Aikens,*** 460 U.S. 711, 716 (1983).

Consequently, Stidham, as in most employment discrimination lawsuits, seeks to prove intent through inference. Plaintiffs generally cannot present evidence that definitively points to their employer's actual reasons for making the adverse employment decision. They must instead try to show that no other reason for the discrimination is plausible and that, therefore, discrimination must have been the reason. ***Marzano,*** 91 F.3d at 508.

The burden shifting analysis enunciated in ***McDonnell Douglas*** does not place a significant burden on plaintiff to establish a ***prima facie*** case. The evidentiary burden is light at this stage because plaintiff need only show that discriminatory intent could be the reason for the employer's action. The initial burden was never intended to be onerous. ***Burdine,*** 450 U.S. at 253.

> Jumping over this first hurdle, however, has important consequences. By meeting his or her *prima facie* burden, the plaintiff earns the right, as in a poker game, to require the employer to show its hand – that is, to offer an explanation other than discrimination why the employee suffered an adverse employment action. It is as if plaintiff told the employer, "I cannot get into your mind to prove with certainty that you acted against me based on a discriminatory motive. You, on the other hand, know the reason why you acted against me. I have done the best I can, which is to show that discrimination could have been the motive. Therefore, it is your turn to prove me wrong by articulating the nondiscriminatory reason for your action." If the employer is unable to proffer a nondiscriminatory reason, plaintiff is entitled to summary judgment or judgment as a matter of law, as the case may be; if the employer proffers a reason and the plaintiff can produce enough evidence to enable a reasonable factfinder to conclude that the proffered reason is false, plaintiff has earned the right to present his or her case to the jury.

Marzano, 91 F.3d at 508.

As Chief Justice Rehnquist has explained,

> A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons,

> especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Furnco Construction Corporation v. Waters, 438 U.S. 567, 577 (1978), (internal citation omitted).

The Eighth Circuit severely curtails the burden shifting analysis in ***Burdine*** by requiring evidence of intent at the *prima facie* stage of the case. In so doing, the Eighth Circuit subverts the analytical framework for analyzing discrimination cases that has been developed by jurisprudence of other circuits. Under the *prima facie* requirements of the Eighth Circuit, rarely if ever will a plaintiff satisfy the fourth prong of the *prima facie* case in a reduction in force situation. Rarely if ever will the employer be forced to articulate a nondiscriminatory reason for its employment decision. Where a plaintiff is required to prove intent as such in establishing her *prima facie* case, she will lose easily on summary judgment. The Eighth Circuit uses the fourth element of the *prima facie* case as a screen. This is not the purpose of the *prima facie* case under jurisprudence established by this Court.

The essential issue in employment discrimination is: "Why did the employer take an adverse employment action against plaintiff?" Under ***Furnco*** and ***Burdine***, plaintiff is not required to prove intent at the *prima facie* stage of her case. The employer must answer the question of "why?" If plaintiff can produce some evidence showing that there is pretext, a factual question remains and the case should go to trial.

Plaintiff raises a genuine issue of material fact when she points to evidence which calls into question the defendant's intent. In those situations, summary judgment would rarely be appropriate. The analytical framework established by the Eighth Circuit Court of Appeals requires plaintiff to produce an answer to the intent question. In the Eighth Circuit plaintiff will lose her case on summary judgment in most, if not all, cases involving a reduction in force where there is no direct evidence of intentional discrimination. In a case often cited with approval in various circuits, the district court was chastised for making the burden of establishing a *prima facie* case more onerous than governing precedent permits. ***Mitchell v. Baldrige,*** 759 F.2d 80, 83-85 (D.C. Cir. 1985).

In Stidham's case the vast majority of her most important duties were taken over by an employee that was in her late twenties or early thirties. All three employees selected for termination by Stidham's supervisor were in the protected class. Stidham's supervisor testified that he never seriously considered terminating any other employees. Employees who were not in the protected class were not even considered for termination. The Eighth Circuit is essentially saying that plaintiff's evidence couldn't even be introduced into evidence in front of a jury because it was not probative. Clearly, the Eighth Circuit either misunderstood the legal standard in the burden shifting analysis required in such a case, or the Eighth Circuit ignored all evidence favorable to the nonmoving party in 3M's motion for summary judgment. Under these circumstances, the employer should be required to answer why Stidham rather than a younger employee was terminated. Stidham would have established a *prima facie* case under the standard established in the Third Circuit. Based on the analysis of other circuits as described below, Stidham also would have established a *prima facie* case in other circuits as well.

In the Ninth Circuit, where the discharge in question truly is a reduction in force plaintiff need not show that she was replaced. It is enough to show that the discharge occurred under circumstances giving rise to an inference of age discrimination. This inference can be established by showing that the employer had a continuing need for plaintiff's skills and services and that her various duties were still being performed. ***Coleman v. Quaker Oats Co.***, 232 F.3d 1271, 1281 (9th Cir. 2000).

The permutation followed by the Seventh Circuit requires that plaintiff prove: "(1) the employee is a member of the protected class...; (2) the employee was performing at a satisfactory level; (3) the employee was subject to an adverse employment action; and (4) the employee was treated less favorably than younger, similarly situated employees." ***Schuster v. Lucent Technologies, Inc.***, 327 F.3d 569, 574 (7th Cir. 2003), citing ***Krchnavy v. Limagrain Genetics Corp.***, 294 F.3d 871, 875 (7th Cir. 2002).

The fourth prong of the test is met, according to the Seventh Circuit, in a "mini" reduction in force situation where plaintiff shows simply that she was "constructively replaced," and that her "responsibilities were absorbed by employees not in the protected class." ***Ritter v. Hill 'N Dale Farm, Inc.***, 231 F.3d 1039, 1043 (7th Cir. 2000).

The Second Circuit holds:

> When an employer initiates a reduction-in-force, an employee has the initial burden of establishing a *prima facie* case of unlawful age discrimination by showing 1) she belongs to the protected age group; 2) she was qualified to assume another position had it been available at the time she was discharged; 3) she was

> discharged; 4) and that the discharge occurred under circumstances suggesting that age was a factor.

Gallo v. Prudential Residential Services, 22 F.3d 1219, 1224 (2d Cir. 1994), citing ***Maresco v. Evans Chemetics, Div. of W.R. Grace Co.***, 964 F.2d 106, 110-11 (2d Cir. 1992).

The Court stated that the resurrection of plaintiff's duties suggests age was a factor. ***Id.*** at 1225. "Plaintiffs' burden of proof in an ADEA case under ***McDonnell Douglas/Burdine*** analysis is *de minimus* at [the *prima facie*] stage" of the case. ***Id.*** Once plaintiff establishes a *prima facie* case, then the burden shifts to the employer to provide a reason for the employment decision. ***Id.*** at 1226.

In summary, the Second, Third, Seventh, and Ninth Circuits allow plaintiff to establish a *prima facie* case by showing that younger individuals were retained after a reduction in force who were not in the protected class or by establishing that plaintiff's duties were taken over by younger individuals. These Circuits do not require any evidence of intent other than that which is inferred from these circumstances.

In other circuits there appears to be some inconsistency between the language used by the court in defining what is required in a *prima facie* case, and the application of that standard. For example, the Tenth Circuit in ***Stone v. Autoliv ASP, Inc.***, 210 F.3d 1132 (10th Cir. 2000), states:

> [A] claimant affected by a [reduction in force] must prove: (1) the claimant is within the protected age group; (2) he or she was doing satisfactory work; (3) the claimant was discharged despite the adequacy of his or her work; and (4) there is some evidence the

> employer **intended to discriminate** against the claimant in reaching its [reduction in force] decision.

Id. at 1137, citing ***Ingels v. Thiokol Corp.***, 42 F.3d 616, 621 (10th Cir. 1994). (Emphasis added by Petitioner).

> The standards applicable to the fourth element of a *prima facie* case of discrimination in the context of a [reduction in force] are not fully defined. Although "[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent." ***Branson v. Price River Coal Co.***, 853 F.2d 768, 771 (10th Cir. 1988), questions such as "whether a single younger employee retained in a similar position is sufficient to establish the fourth element, or how similar a position must be in order to be relevant under ***Branson***," remain unanswered.

Stone v. Autoliv ASP, Inc., 210 F.3d at 1137-38, quoting ***Beaird v. Seagate Tech., Inc.***, 145 F.3d 1159, 1166 (10th Cir. 1998).

Unlike the circuits cited above, some courts have modified the fourth prong in the *prima facie* case, as has the Eighth Circuit in Stidham's case, by eliminating the possibility that plaintiff can create a rebuttable presumption by showing that the employer retained younger individuals. Some circuits require additional direct, circumstantial, or statistical evidence to indicate that the employer singled out the employee for discharge because of age. See, for example, ***Rowan v. Lockheed Martin***, 360 F.3d 544 (6th Cir. 2004).

According to the Sixth Circuit, "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizings, plant closings and relocations." ***Allen v. Diebold, Inc.,*** 33 F.3d 674, 677 (6th Cir. 1994).

In the Eleventh Circuit:

> In order to state a *prima facie* case of age discrimination involving a reduction in force, a plaintiff must demonstrate that: (1) he was a member of the age group protected by the ADEA and was adversely affected by an employment decision; (2) he was qualified for his current position or to assume another position at the time of discharge; and (3) there is evidence from which a reasonable factfinder could conclude that the employer **intended to discriminate** on the basis of age in making its employment decision.

Mitchell v. USBI Company, 186 F.3d 1352, 1354 (11th Cir. 1999), citing ***Benson v. Tocco, Inc.***, 113 F.3d 1203, 1208 (11th Cir. 1997). (Emphasis added by Petitioner).

II. Certiorari is warranted because the Eighth Circuit inappropriately modified the burden shifting framework announced by this Court in *McDonnell Douglas Corporation v. Green,* and *O'Connor v. Consolidated Coin Caterers Corp.,* and created a new legal standard for disparate treatment cases.

The burden shifting formula in disparate "treatment" cases should allow plaintiff to establish a *prima facie* case with evidence that younger individuals were retained and her job responsibilities were substantially taken over by younger

individuals. Stidham met that standard. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for its employment decision. The employer in Stidham's case said that her position was redundant. Stidham came forward with substantial evidence showing that her job position was not redundant. Nonetheless, the Eighth Circuit disregarded Stidham's evidence of pretext and, in fact, searched for its own justification for the employment decision apart from the reason articulated by the employer. In so doing it not only disregarded plaintiff's evidence of pretext, it entirely relieved the employer of its burden to articulate a nondiscriminatory reason and deprived plaintiff of the right to present evidence challenging that reason.

McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) has been widely used in Title VII litigation and has been accepted as a guideline for establishing *prima facie* cases under the ADEA. According to ***O'Connor v. Consolidated Coin Caterers Corp.***, 517 U.S. 308, 310 (1996), to make out a *prima facie* case, plaintiff must establish: (1) She was in the age group protected by the ADEA, (2) She was discharged or demoted, (3) At the time of her discharge she was performing her job at a level that met her employer's legitimate expectations, and (4) Following her discharge or demotion, she was replaced by a younger individual possessing comparable qualifications.

The Eighth Circuit states that the fourth element of a *prima facie* case in a reduction in force context requires some additional evidence of age discrimination. App. 5a. The Eighth Circuit has consistently applied this standard for establishing a *prima facie* case in reduction in force cases. See ***Hardin v. Hussmann Corp.***, 45 F.3d 262, 264 (8th Cir. 1995); ***Barnes v. GenCorp, Inc.***, 896 F.2d 1457 (8th Cir. 1990); and ***Fischer v. Pharmacia & Upjohn,*** 225 F.3d 915

(8th Cir. 2000); ***Bashara v. Blackhills Corporation,*** 26 F.3d 820, 823 (8th Cir. 1994).

In Stidham's case, the Eighth Circuit specifically states that the fact that Stidham's duties were taken over by a younger individual does not raise an inference of age discrimination. The Court in Stidham holds that a finding that a younger person assumed the job responsibilities of an older displaced worker by itself was not enough to prove the *prima facie* case. App. 8a.

However, this Court has previously instructed that the age of petitioner's replacement gives rise to a reasonable inference of discrimination. ***O'Connor***, 517 U.S. 312. The replacement of Stidham by an individual in her late twenties or early thirties establishes a *prima facie* violation. An inference of discrimination is also drawn where an older employee is replaced by a significantly younger employee where both are in the protected class. ***Id.*** at 313. Stidham established that her duties were taken over by a woman in her late twenties and a man that was eight years younger than Stidham.

In ***Reeves v. Sanderson Plumbing Products, Inc.***, 530 U.S. 133, 153-54 (2000), this Court held that a *prima facie* case, together with sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination.

Certiorari was granted in ***Reeves*** to resolve a conflict among the U.S. Courts of Appeal as to whether a plaintiff's *prima facie* case of discrimination (as defined by ***McDonnell Douglas***), combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. ***Id.*** at 140.

While ***Reeves*** is not a reduction in force case, its holding regarding the sufficiency of evidence needed to establish a *prima facie* case should apply to Stidham. The court in ***Reeves*** stated:

> [T]he Court of Appeals proceeded from the assumption that a *prima facie* case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination. In so reasoning, the Court of Appeals misconceived the evidentiary burden born by plaintiffs who attempt to prove intentional discrimination through indirect evidence."

Id. at 146.

In Justice Ginsberg's concurring opinion she noted:

> [I]t may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories *(i.e., evidence establishing a prima facie case as in* ***McDonnell Douglas****; and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false)* in order to survive a motion for judgment as a matter of law.

Id. at 154. (Parenthetical added by Petitioner).

Under the standards established by this Court in ***Reeves*** and ***O'Connor***, Stidham established her *prima facie* case. Stidham held a unique position at 3M and performed essential

services for the company. According to her supervisor, there was vital work for her to do in the coming year. After she was eliminated, her duties were taken over by an employee in her late twenties or early thirties and by a person who was eight years younger than her. The only issue on summary judgment should have been whether Stidham met her burden by coming forward with evidence showing that 3M's reason for her discharge was a pretext for age discrimination. 3M alleges that Stidham was terminated because her job was "redundant." The supervisor that made the decision to terminate Stidham also terminated two other employees because he felt they were "redundant." All three of the employees terminated by Stidham's supervisor were in the protected class. Stidham came forward with substantial evidence in opposition to 3M's motion for summary judgment showing and that younger employees not in the protected class were not even considered for termination.

The Eighth Circuit stated that the articulated nondiscriminatory reason given by 3M was that Stidham's position was redundant. The Court then went on to state, "We concede anyone examining the environmental administrator position under this definition will most likely conclude her position was not redundant because the position was unique to 3M Columbia." App. 7a. The Court then states that this evidence does not raise an inference of discrimination because 3M could have used a different factor: "those positions whose duties could be eliminated or reassigned to others without negatively impacting plant efficiency or customer service." App. 7a.

3M did not advance "efficiency" as a reason for eliminating Stidham's position. This justification was articulated by the Eighth Circuit, not the employer. The burden shifting analysis developed by this Court under

McDonnell Douglas requires that the employer articulate a nondiscriminatory reason for the employment decision. In Stidham's case, the Eighth Circuit articulated the nondiscriminatory reason for the employer. The Eighth Circuit went on a roving commission to find any possible reason to uphold the employment decision, even if that reason was not advanced by the employer. This *post hoc* analysis effectively deprived Stidham of presenting evidence contrary to the Court's theory.

It should have been enough that Stidham rebutted the employer's argument that her position was redundant. The fact finder's disbelief of the reason offered by the employer may, together with the Petitioner's *prima facie* case, suffice to show intentional discrimination by the employer. ***St. Mary's Honor Center v. Hicks,*** 509 U.S. 502, 511 (1993). Stidham convinced the Eighth Circuit that her position truly was not "redundant." Stidham's case should have gone to the jury. The jury could evaluate all the evidence establishing her *prima facie* case and all the evidence of pretext on the part of 3M. There was certainly probative evidence that the real reason for termination was age because only older individuals were even considered for elimination.

This Court has recently taken up the question of plaintiff's burden of proof in a disparate impact case involving age discrimination.

> As we held in ***Wards Cove*** [***Parking Co. v. Atonio,*** 490 U.S. 642, 656 (1989)] it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is "responsible for isolating and identifying the *specific* employment

> practices that are allegedly responsible for any observed statistical disparities."

Smith v. City of Jackson, Miss., 125 S.Ct. 1536, 1545 (2005). quoting ***Watson v. Fort Worth Bank and Trust,*** 487 U.S. 977 (1988). (Emphasis added in ***Smith*** opinion).

Although Stidham is not an impact case, the Eighth Circuit has grafted disparate impact analysis into the analytical framework for the *prima facie* case in a reduction in force situation. Though Stidham came forward with some evidence that there was statistical significance with respect to the age of employees that were terminated, the Court in Stidham required that she prove intent on the part of the employer for this outcome. It was as if the Eighth Circuit was requiring Stidham to identify the exact mechanism (intent) that caused her termination. The Eighth Circuit does not allow Stidham to use the process of elimination to show that the reason given by 3M (redundancy) was not the real reason.

The Eighth Circuit violates this Courts burden shifting analysis established in ***McDonnell Douglas Corporation v. Green*** by requiring that plaintiff prove intent at the *prima facie* stage of the case. The Eighth Circuit further violates the burden shifting framework by disregarding plaintiff's proof that the alleged legitimate nondiscriminatory reason for the employment action is in fact false. The Eighth Circuit effectively relieves the employer of any burden at the pretext stage of the case by disregarding plaintiff's evidence of pretext and searching for any possible legitimate reason for the employment decision even when that reason is not advanced by the employer.

CONCLUSION

Certiorari is warranted in this case because the decision by the Eighth Circuit is in conflict with other circuits with respect to what is required to establish the fourth prong in the *prima facie* age discrimination case in a reduction in force context. The Eighth Circuit has inappropriately modified the fourth prong of the *prima facie* case in reduction in force situations when a claim is brought for age discrimination. The Eighth Circuit requires that plaintiff provide additional evidence of intent. The Eighth Circuit requires a higher burden than in other circuits by forcing plaintiff to establish intent in her *prima facie* case rather than relying on the fact that younger individuals outside the protected class were retained after reduction in force and her duties were taken over by younger individuals. Other circuits allow plaintiff to meet her *prima facie* burden by establishing that younger individuals were retained or that a younger individual took over her job responsibilities. It is clear that had Stidham been decided by the Third Circuit Court of Appeals, she would have survived 3M's motion for summary judgment. Moreover, certiorari is appropriate because the Eighth Circuit has inappropriately modified the burden shifting analysis established by this Court in ***McDonnell Douglas***. Under the reasoning of the Eighth Circuit in Stidham, there really is no burden that shifts to the employer.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1277

[Filed April 21, 2005]

Deborah Stidham, Appellant,	)
v.	)
Minnesota Mining and Manufacturing, Inc., d/b/a 3M Company, Appellee.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1277

[Filed February 25, 2005]

Deborah Stidham,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Minnesota Mining and Manufacturing, Inc.,	)
d/b/a 3M Company,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Western District of Missouri

Before MURPHY, MCMILLIAN, and BYE, Circuit Judges.

OPINION

BYE, Circuit Judge.

Deborah Stidham appeals the district court's[1] order granting summary judgment to her employer Minnesota Mining and Manufacturing, Inc. (3M), on claims brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. ch. 213. She contends the district court erred by not allowing her claims of age discrimination to proceed to trial and by ruling against her as a matter of law. Because we conclude no reasonable jury could find in her favor, we affirm.

I

Ms. Stidham worked for 3M in Columbia, Missouri from 1976 to 2001. For most of her years with 3M, she worked in the production department, but in the summer or fall of 2000 she was selected to fill the newly created "Environmental Administrator" position within the plant engineering department. As Environmental Administrator, she was responsible for ensuring compliance with federal and state environmental laws, promoting recycling, and most importantly coordinating the waste refrigerant capturing duties. By all accounts, she satisfactorily performed her job and got along well with the department's other employees.

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[1] The Honorable William A. Knox, United States Magistrate Judge for the District of Western Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c).

As Ms. Stidham assumed her position in late 2000 and early 2001 an economic recession plagued the United States. As a result of the corresponding downturn in business, high-level 3M management directed the 3M Columbia management, among other cost saving measures, to identify and eliminate redundant salaried employees. At 3M Columbia, the responsibility for pinpointing the redundant positions fell upon each department manager.

Larry Wall, Ms. Stidham's department manager, identified three redundant positions within the plant engineering department. One of those positions was the Environmental Administrator position held by her at age fifty. The other two positions identified as redundant were held by Paul Blakemore, age fifty, and C.J. Welch, age forty-six. After her position had been eliminated, the duties deemed nonredundant were assumed by Rebecca Hyde, an individual under age forty, and Terry Smith, an individual over age forty. Overall, 3M Columbia eliminated sixteen salaried positions, fifteen of which were held by persons over the protected age of forty.

While 3M eliminated sixteen positions from its salaried staff, 3M offered the employees whose positions were eliminated a rehire at a non-salaried position or a severance package. Ms. Stidham was offered her old job in the production department, where if she would have accepted it, an employee with less seniority would have been displaced. She also declined the severance package, which, in exchange for a release of all claims against 3M, would have consisted of one and one half weeks pay for each year employed. Instead she opted instead to file the present action, which the district court dismissed following an adverse grant of summary judgment.

II

We are mindful summary judgment should seldom be utilized in employment cases. *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997). However, in viewing the proffered evidence of age discrimination discussed below in the light most favorable to Ms. Stidham, we hold no reasonable jury could find in her favor, thus the district court properly entered judgment for 3M as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'") (citation omitted).

The ADEA forbids an employer from discriminating against an employee at or above the protected age of forty years because of the employee's age. 29 U.S.C. §§ 623(a)(1), 631(a). In cases such as the present, which involve a reduction-in-force rather than a replacement of an older employee with a younger employee, a plaintiff may make a prima facie case of age discrimination by establishing: (1) she is within the protected age group; (2) she met the applicable job qualifications; (3) she suffered an adverse employment action; and (4) there is some additional evidence that age was a factor in the employer's action. *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994).

It is undisputed Ms. Stidham can establish the first three elements of her prima facie case. The dispute arises under the fourth element–whether she can show some additional evidence that age was a factor in her demotion. In the absence of direct evidence of age discrimination, she may satisfy her burden "by presenting either statistical evidence (such as a pattern of forced early retirement or failure to promote older

employees) or 'circumstantial' evidence (such as comments and practices that suggest a preference for younger employees)." *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 856 (8th Cir. 2003) (quoting *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997)).

We first examine the statistical evidence. Ms. Stidham emphasizes the statistical evidence showing fifteen out of sixteen terminated salaried employees were over age forty. This statistic looks ominous at first glance, but not when you consider the great majority of salaried employees at 3M Columbia were over age forty. As we said in Chambers, "statistical evidence is meaningless without some analysis of the age of the entire workforce . . . before and after the reduction in force." *Id.* (citing *Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1167 (8th Cir. 1985)). Before the reduction-in-force, 72% of the salaried employees in her department were over age forty, after the reduction 68% remained over the age of forty. In addition, after the reduction-in-force the average age of employees declined by only half of a year. A 4% decline in the work force over age forty and a half-year decrease in the average age of the work force is not statistically significant. *See EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 952 (8th Cir. 1999) (finding that change in percentage of workforce fifty-five and older from 14.7% to 13.6% is insignificant and does not support inference of age discrimination); *Hanebrink*, 110 F.3d at 647 (finding a half a year decline in the average age of the employee group was insufficient to raise an inference of age discrimination). Moreover, when we look more closely at plant-wide statistics, we find seventy low-seniority workers in the production department (many of whom were presumably under age forty) were also terminated as a result of the reduction-in-force. Therefore, we conclude the statistical evidence does not provide "additional evidence" of age discrimination.

Lacking statistical evidence, Ms. Stidham must rely on inferences of age discrimination derived from circumstantial evidence. *Chambers*, 351 F.3d at 856. Her most compelling circumstantial evidence, she believes, is 3M's reliance on a definition of the term redundant that does not match the ordinary meaning of the term. She contends this reliance raises an inference of age discrimination. She explains, if the term "redundant" is given its ordinary meaning, her position is not redundant. According to her, the term "redundant" ordinarily means: "Exceeding what is required or natural. Unnecessarily repetitive." Thus, according to her, a repetitive position is one that involves doing the same tasks which are already being done by some other person. We concede anyone examining the Environmental Administrator position under this definition will most likely conclude her position was not redundant because the position was unique to 3M Columbia.

However, this evidence does not raise an inference of discrimination because, despite Ms. Stidham's wishes, we cannot change the definition of redundant used by 3M to fit her needs. Redundant as the term was used by 3M is clearly a term of art, not meant to encompass the ordinary meaning of the word. In depositions, 3M department managers gave definitions of the term "redundant positions" that were slightly different but similar in all material respects. 3M department managers define "redundant positions" as those positions whose duties could be eliminated or reassigned to others without negatively impacting plant efficiency or customer service. If we examine her position under 3M's definition of redundant, which we must, the Environmental Administrator position easily fits within that definition. The position of Environmental Administrator was relatively new, only a few months old, and one which 3M operated without for most of its long history. In fact, in lean economic times,

we are not surprised a corporation would eliminate an environmental position, as such are often seen by corporations as superfluous and not likely to improve plant efficiency or customer service. The decision to cut the sole environmental position may not be environmentally responsible, but our role is not to act as a super-personnel department second-guessing business judgments. *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

Ms. Stidham claims the fact some of the duties of her position were not eliminated, but reassigned to younger employees provides additional circumstantial evidence of age discrimination. After her demotion, the important aspects of her position were assumed by Rebecca Hyde, an individual younger than forty years of age, and Terry Smith, an individual over forty years of age but younger than Ms. Stidham. Once again, her circumstantial evidence does not raise an inference of age discrimination. In reduction in force cases, it must be expected that some duties will be taken on by other employees. *Chambers*, 351 F.3d at 855-58. Thus, the mere fact that younger persons took on some of her responsibilities is not sufficient evidence of age discrimination. *See Hanebrink*, 110 F.3d at 646 (finding evidence of a younger person assuming job responsibilities of an older displaced worker by itself was not enough to prove the prima facie case).

Next, Ms. Stidham points to the six positions in the department held by persons younger than forty which were not evaluated for redundancy and further alleges the positions evaluated for redundancy were not based upon any objective criteria. She contends these alleged facts lead to an inference that 3M either only evaluated positions occupied by older workers for redundancy or intentionally placed older workers in redundant positions. The inferences she wishes to draw are

not supported by the record. While the six positions held by younger workers may not have been evaluated for redundancy, she provides no evidence any of the six positions were actually redundant within 3M's definition. The characterization of 3M's decision as subjective is also not supported by the record. The department managers, including Wall, had a similar understanding of the term "redundant" and applied the definition according to that understanding. Under 3M's definition of redundant positions-positions whose duties could be eliminated or reassigned to others without negatively impacting plant efficiency or customer service-it should not be surprising that Ms. Stidham's position was found to be redundant. As mentioned, the position of Environmental Administrator was a relatively new position, which 3M operated without for most of its long history.

As an aside, the undisputed evidence reveals Wall made the decision to eliminate Ms. Stidham's position. At the same time Wall was making the decision on which positions to eliminate as redundant, Wall gave her a positive performance evaluation. This evidence tends to indicate Wall had no discriminatory animus towards her. *Hutson*, 63 F.3d at 779 (noting that even capable employees are released when employer is downsizing). In fact, the positive performance evaluation coupled with the fact she was recently promoted from her old production position to the Environmental Administrator position tends to show Wall and 3M had no discriminatory animus towards her. *See Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992) ("It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later."). The fact seven employees older than Ms. Stidham remained in the department also tends to rebut the accusation age was a reason for the demotion. *See*

Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) (stating evidence that six of the eight oldest employees were discharged did not raise an inference of discrimination given that the two oldest were retained).

Finally, Ms. Stidham claims the fact that she was demoted shortly after her refusal to take a cut in retirement benefits provides evidence of age discrimination. This fact could be damaging to 3M if it were not for the fact 3M did not terminate her. She was not forced to leave 3M, but merely offered a reassignment to the production department, a place she previously worked and which she left only a few months earlier. The record is devoid of evidence indicating her retirement benefits would have been affected by this reassignment.

III

The district court's judgment is affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 02-4058-CV-C-WAK

[Filed November 24, 2003]

DEBORAH STIDHAM, Plaintiff,	)
v.	)
MINNESOTA MINING AND MANUFACTURING, d/b/a 3M Company, Defendant.	)

ORDER

Plaintiff Deborah Stidham worked for defendant Minnesota Mining & Manufacturing (3M Company) between 1976 and 2001. She and approximately fifteen other employees were terminated in the summer of 2001 during a reduction in force at the Columbia, Missouri, facility. She brought this suit in April 2002, alleging her termination violated provisions of the Age Discrimination in Employment

Act (ADEA), 29 U.S.C. § 623, et seq., and the Missouri Human Rights Act, Chapter 213 RSMo.

On July 1, 2003, defendant 3M Company filed a motion for summary judgment asserting there are no genuine issues of material fact for trial and it is entitled to judgment as a matter of law. Specifically, 3M Company states that plaintiff's position was eliminated based on business needs as part of a legitimate reduction in force and it was not motivated by any discriminatory animus. Further, it contends plaintiff was given an opportunity to continue her employment with 3M Company in another position, but chose not to do so.

Plaintiff responded in opposition to the motion for summary judgment and defendant replied. Oral argument was held on September 16, 2003, and plaintiff subsequently supplemented her response to the motion. Accordingly, the motion is now fully submitted and ready for ruling.

Summary Judgment Standard

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and

admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." *Hass v. Weiner,* 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan,* 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed. R. Civ. P. 56(c).

Discussion

The parties assert this case should be considered under the burden-shilling framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). They dispute whether plaintiff has made a prima facie case of age discrimination, and if she has done so, whether she has also made a showing that the reason offered by defendant for her discharge was a pretext for age discrimination. The court notes that ADEA and MHRA claims are to be analyzed under the same standard. *Fast v. Southern Union Co., Inc.* 149 F.3d 885 (8th Cir. 1998).

Plaintiff Deborah Stidham worked in the plant engineering department of 3M Company beginning in August 1976. In the summer or fall of 2000, she was selected to serve within the department in a new position called Environmental Administrator. No other employee within the department held this title or engaged in the same duties. The records indicate she performed her job requirements in a satisfactory manner and that she did not have problems with her supervisors or other workers.

In the first quarter of 2001, however, division management in Austin, Texas, notified the 3M Company Columbia management staff to eliminate approximately sixteen salaried or nonproduction positions at the Columbia facility. 3M Company asserts that division management directed Columbia management to identify and reduce redundant positions. Redundant positions were positions comprised of functions which could be eliminated or distributed to other employees with minimal impact on the local operation. 3M Company states it looked at the positions, not the employees or the personal characteristics of the employees holding those positions, when considering where reductions could be made. Plaintiff does not dispute that a legitimate reduction in force was ordered by division management in Texas, but claims that age bias played a part in the local decisions of who was terminated.

It is undisputed that Larry Wall served as the Plant Engineering Manager in Columbia and he was the person responsible for identifying the positions to be eliminated within the plant engineering department. At the time, there were 22 salaried positions in the department and he identified three as redundant, including the Environmental Administrator position held by plaintiff. He was also the person who had recommended plaintiff for her position as

Environmental Administrator and who gave her good evaluations during her tenure in that position.

There were nineteen positions remaining in the plant engineering department after the reduction in force, and seven of those positions were held by individuals older than plaintiff. Larry Wall was older than plaintiff and held one of those seven positions. An eighth employee was only a few days younger than plaintiff. The average age of employees in the plant engineering department before and after the reduction in force was approximately 44 years.[1]

Plaintiff Stidham was given the option of using her production seniority to return to a production position, to accept a severance package in exchange for a signed release, or pursuing whatever legal action she chose against 3M Company. All of the other employees whose positions were eliminated took either a production position or the severance package. Stidham declined both and brought this suit.

The ADEA forbids an employer from discharging an employee within the protected age group because of the employee's age. To make a prima facie showing of age discrimination under the Act, the plaintiff must establish (1) that she is within the protected age group; (2) that she met the applicable job qualifications; (3) that she was discharged; and (4) in the case of a reduction in force, that there is some evidence that age was a factor in her termination. *Bashara v.*

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[1] The record is not entirely clear whether the average age refers to all employees in the department or only salaried employees in the department.

Further, the average age of salaried employees at the Columbia 3M Company plant (and not just in the plant engineering department) before the reduction in force was 42 years.

Black Hills Corp., 26 F.3d 820, 823 (8th Cir. 1994). The first three factors are not in dispute in this case.

To support her claim that age was a factor, plaintiff states that fifteen of the sixteen persons in the entire plant whose positions were terminated were over the age of forty. She also asserts that in 2001, 3M Company changed its retirement plan for new employees and offered the new plan to existing employees. Further, she claims that 3M Company divisional management did not offer written or objective criteria to Columbia management on how to implement the reduction, and that different local members of management used different criteria. Thus, after offering places where other reductions could have been made, she questions the legitimacy of 3M Company's stated reason for her discharge.

Citing *Yates v. Rexton, Inc.*, 267 F.3d 7893 (8th Cir. 2001), and *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995), plaintiff asserts that at the prima facie stage, all she needs to show is that there are circumstances from which, in the absence of an explanation from defendant, the fact finder may reasonably infer intentional discrimination. At the pretext stage, however, she acknowledges that the question is much more focused on the evidence showing age as a reason for her termination.

At the summary judgment stage, assuming plaintiff has shown a prima facie case, plaintiff can avoid summary judgment only if "the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision." *Rothemeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996). The ultimate question of law is "whether the evidence is sufficient to create a genuine issue

of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiffs age." *Id.* at 1337.

In this case, plaintiff has not come forward with sufficient evidence to create a genuine issue of fact as to whether 3M Company intentionally discriminated against her because of her age. She does not dispute that Wall made the decision in the plant engineering department regarding which positions were to be eliminated. The statistics regarding the age of employees in that department do not indicate a significant change after the reduction in force. The statistics upon which plaintiff wants to rely, which are plant wide, are irrelevant because they involve different decision makers whom plaintiff acknowledges used different criteria or may have used-different criteria than Wall. Plaintiff has come forward with no evidence suggesting that Wall had any age-based bias against her or other employees, or that he used any such criteria in determining which positions would be eliminated. Further, given the evidence that of the 21 salaried positions in Wall's department, fifteen of them were held by individuals over the age of forty and six by individuals under the age of forty, it is not as surprising that the terminations significantly involved individuals in the protected age group.

Plaintiff's other arguments are merely challenges to the business decisions of the corporation and its management. They lend no support to plaintiff's argument that age bias was a motivating factor in the choice of which positions would be eliminated. The federal court may not reexamine the business decisions of the corporation, but should only determine whether the stated reason for the decision was the true reason. *Wilking v. County of Ramsey,* 153 F.3d 869, 873 (8th Cir. 1998). Here, plaintiff has come forward with no relevant evidence, direct or circumstantial, which supports her claim that age bias was a factor in Larry Wall's decision that her

position was redundant and could be eliminated. Her belief that such was the case, without more, is not sufficient to create a material fact dispute.

For these reasons and those set forth in more detail in the defendant's pleadings and at oral argument, it is

ORDERED that defendant's motion of July 1, 2003, for summary judgment is granted and this case is dismissed [40]

Dated this 24th day of November, 2003, at Jefferson City, Missouri.

/s/_____
WILLIAM A. KNOX
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 02-4058-CV-C-WAK

[Filed November 26, 2003]

DEBORAH STIDHAM,	)
Plaintiff,	)
	)
v.	)
	)
MINNESOTA MINING AND	)
MANUFACTURING, d/b/a	)
3M Company,	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

By the Court's order of November 24, 2003, defendant's motion of July 1, 2003, for summary judgment is granted and this case is dismissed.

ENTERED ON: November 26, 2003

/s/_____
Patricia L. Brune, Clerk

APPENDIX E

Excerpt
Defendant's Answers to
Plaintiff's First Interrogatories

[Filed March 6, 2003]

[p.4]

INTERROGATORY NO. 3: State each and every position that Plaintiff held at 3M and the time periods for which she held them, beginning with her first position at 3M and continuing chronologically.

ANSWER: Defendant 3M objects to this Interrogatory on the grounds that plaintiff already possesses the information sought by this Interrogatory and it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any objections, defendant 3M states that plaintiff has held the following positions during her employment with 3M:

8/02/76	General Assembly
3/26/79	Machine Tender
4/19/80	Shift Supervisor
1/12/82	Warehouse Supervisor
10/01/89	Production Control Analyst I
5/01/94	Safety Analyst
9/01/00	Environmental Administrator

* * *

See Fold Out Exhibit
Pages 9-10

Employee Name	Position on April 23, 2001	Service Credit Date	Age on April 23, 2001
Dennis Brunner	Engineering Specialist	7/10/79	41
Bill Moore	Engineering Specialist	2/08/82	45
Conrad Lee Nill	Manufacturing Production Manager	5/29/84	47
Rebecca Morlando	Chemist Specialist	2/17/97	29
Frank Sommerfeldt	Engineering Specialist	1/08/88	35
Cynthia Sommerfeldt	Senior Process Engineer	6/30/84	40
Kenneth West	Manufacturing Supervisor	8/28/78	50
John Wetz	Production Manager	1/07/87	46
Tanmay Shah	Manufacturing Engineer	12/08/94	27

INTERROGATORY NO. 9: State which positions, and the name and age of the person holding the position, within Plaintiff's work group that were considered in determining redundancies or redundant duties as part of Defendant's alleged reduction in force in 2001 that is the subject of this action.

ANSWER: Defendant 3M objects to the extent this Interrogatory seeks to invade the privacy of non-parties to this litigation. Subject to and without waiving any objections, defendant 3M states that the following salaried individuals were in plaintiff's work group in April 2001:

Employee Name	Position Title	Date of Birth
Merrilee Barta	Maintenance Engineer	12/06/71
Paul Blakemore	Plant Engineering Technician	3/18/51
Patti Braman	Purchasing Clerk	4/21/61
Connie Foster	Safety Supervisor	10/18/51
Jan Fricke	Accounting Clerk	12/23/59
John Griggs	Facility Supervisor	1/30/46
Tom Hayter	Site Services Manager	2/28/46
Randy Huck	Safety Administrator	5/25/50

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Employee Name	Position Title	Date of Birth
Bill Marshall	Tool & Die Supervisor	12/02/67
Doug Meyer	Industrial Hygienist	2/27/64
Damon Minchey	Equipment Engineer	7/16/77
Bill Moore	Environmental Engineer	7/24/55
Ron Pruett	General Supervisor Tool & Die	8/16/63
Ray Roberts	Systems Technologist	3/17/51
Lewis Robinson	Safety Engineer	10/25/71
Tom Singer	Plant Engineering Supervisor	7/02/53
Terri Smith	Facility Engineer	5/28/56
Roger Sprague	Plant Engineering Supervisor	11/23/49
Debbie Stidham	Environmental Administrator	9/28/51
Pat Stidham	Factory Supply Crib Supervisor	5/28/42
C.J. Welch	Industrial Hygienist Technologist	4/04/55

Further answering, as a member of the Columbia plant management staff, Larry Wall was charged with identifying the redundant positions within his department. While all positions within Wall's department were eligible for consideration as redundant positions, three positions were clearly redundant within Wall's department. Plaintiff's position was one of those positions.

Date: 3/6/03

LARSON • KING, LLP

By: _____

Kathleen M. Mahoney (MN ID #66588)
David M. Wilk (MN ID #222860)
Minnesota World Trade Center, Suite 2800
30 East Seventh Street
St. Paul, Minnesota 55101
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APPENDIX F

Excerpt
Plaintiff's Response and Suggestions in Opposition to Defendant's Motion for Summary Judgment

[Filed July 31, 2003]

[p.17]

ARGUMENT

I. INTRODUCTION

Plaintiff Deborah Stidham worked in the plant engineering department under Larry Wall ("Wall") for the Defendant 3M Company ("defendant" or "3M") in Columbia, Missouri from August 2, 1976 until her unlawful termination July 20, 2001. During that time Plaintiff worked hard to attain the position of Environmental Administrator with a salary of $3,675 per month. Defendant claims that her termination was the result of an economic downturn requiring the release of ten percent of its employees. However, of the 16 employees ultimately terminated, 15 were over the age of 40.

Because Plaintiff has demonstrated a prima facie case and because Defendant has neither articulated a legitimate reason for her termination or established nor shown why the decision to terminate Plaintiff was not pretextual, a genuine issue of material fact remains and Defendant's motion for summary judgment should be denied.

APPENDIX G

3M Contribution and Development Summary for Deborah Stidham for the Review Period from 1/1/2000 to 12/31/2000

[Dated March 23, 2001]

3M Contribution and Development Summary

Status: Finalized
Last Activity: Deborah Stidham
Last Activity Date: 03/23/2001 12:24:34 PM

Employee Name: Deborah Stidham

Employee Number: 01076956

Job Title: Environmental Administrator

Department Name: Environmental/Plant Engineering

Location: Columbia Plant

Primary Coach/Supervisor Name: Bill D. Moore/HE-Columbia/3M/US

Review Period From: 01/01/2000 To: 12/31/2000

Next Level Management (if involved in the electronic review process include name here): Larry Wall/HE-Columbia/3M/US

Major Job Responsibilities (to be completed by Employee and Coach/Supervisor)

1. Manage Implementation of Polyester Film recycling.
2. Assume Refrigerant Coordinator role.
3. Miscellaneous: Various Safety duties in the 1st 1/2 of 2000, member of the Environmental Team for weekly meetings, input for HAZCOM training, input and action as needed in the ongoing Safety Awareness Team, and active participant/trainer in the plant's United Way campaign.

Goals/Expectations (to be completed by Employee and Coach/Supervisor)

#1:

- Implement Polyester Film recycling pilot project
- Apply Regional planning waste minimization grant

#2:

Assume Refrigerant Coordinator Role

#3:

Miscellaneous ES&H duties.

Contributions/Results (to be completed by Employee and Coach/Supervisor)

#1:
Poyester Recycle

- Initiated team meetings with Microflex and warehouse champions to consider all aspects of PET process flow. These meetings were designed for education, obtaining grass roots support, buy-in and consideration of all stakeholders as subject matter experts in each step of the workflow.
- Implemented pilot Gold Plate/Inspection depts. recycling effort to uncover small scale constraints before full scale implementation. 4Qtr pilot results: recovered over $2,500 and saved ~$700 landfill fees.
- Made multiple contacts with various off-site groups such as Resource Recovery, City Waste Minimization Coordinator, Public Works Waste personnel, various recycling brokers and a state/federally funded consultation group, MAMTC.
- Submitted a grant proposal for 75/25% matching funds of ~$100K to help fund equipment and supplies for our full plant polyester recycling.
- In conjuction with PET recycling, I began evaluation of two solid waste brokers offering multi-waste services. These with other brokers will be further evaluated as 2001 progresses.

#2:
Refrigerant Coordinator

- Initiated dialog with corporate contacts for guidance on requirements.
- Audited 3 refigerant handlers for current refrigerant practices.
- Requested file certification of contractors handling refrigerant.
- Initiated refrigerant team of stakeholders to build organizational agreement on requirements of 3M Refrigerant Managment, including bringing some technicians up to certification.

#3:
Miscellaneous

- Maintained the safety plan after creating the subject matter grid for ES&H plant subjects. Maintained & Created Safety Focus 2000 plant training packet, presented approximately 40% of the plant presentations.
- Created and conducted safety presentations for new hires & temp workers for 10 hours weekly.
- Continued as Safety Shoe coordinator, support duties of the Safety Supervisor, Fork Lift Training Team lead, ongoing review of video subjects requested for the video library, collected data on contractor safety records, Safety Awareness effort in heightening safety values and successes through banners, stoplights, and supervisory presented Take Ten subjects.
- Served on United Way rep team for plant donation drive. We were able to increase overall plant participation by 9% and total giving 20.66%.

Key Strengths and Experiences (to be completed by Employee and Coach/Supervisor)

1. Project Management w/Various Assignments; esp. when creativity required as in managing CDC Business implementation.

2. Leadership of People & Project Management Skills, Mfg. Supervision.

3. Material and Production Control Skills.

4. Analytical and Systemic Thinker.

5. Sales record relating to United Way (3M & community relations).

6. Demonstrated Skill in presentation material creation, Public Speaking, Documentation, Graphic Arts, Training & Dev.

7. Knowledge/Understanding of Federal Code of Reg 29 1904,1910 & other misc. agency requirements including related Medical Science Issues.

8. Behavioral Safety Science and related Sociology strength.

9. Broad Understanding Across Several Disciplines including Human Relations.

Development Plan (to be completed by Employee and Coach/Supervisor)

Continue education to maintain CS&H Specialist designation. Work toward Master degree.

Career Interests (to be completed by Employee)

Next Job: Sales or Supervision

Longer Range: Manager

Assignment Mobility Code (to be completed by Employee)

- 0 - Currently unable to relocate

Contributions (to be completed by Coach/Supervisor) Development Code is required for E and G. If Contribution Code is U, Development Code must be unselected.

- G - Good Level of Contribution for this year

Development Code (to be completed by Coach/Supervisor) Next Recommended Job is required for C and I. If Development Code is X, Next Recommended Job and Action Plan are required.

- W - Well placed. Development plans achievable in current job for at least the next year.

Job Change Priority (to be completed by Coach/Supervisor) Candidate for a different position in the next 12 months to provide relevant experience designed to strengthen individual leadership. Applies to Development Codes I, C, or X.

___ - Yes (Action Plan and Next Recommended Job to be completed)

Action Plan (to be completed by Coach/Supervisor) If Job Change Priority or Development Code is X, also include Next Recommended Job(s).

High-Potential (to be completed by Coach/Supervisor) Applies to JG 11+/Equivalents Worldwide.
Individual currently demonstrates the capability to become a future leader within a business, function, or subsidiary. A defined assessment and development plan, including regular follow-up, is required.

Key descriptors

- **Clear Track Record of Desired Results**
- **Likely Succession Candidate at the Senior Technical/Managerial or Executive Levels**
- **Demonstrated Leadership Competence**
- **Ability to go Beyond Normal Progression**
- **Ability to "Change the Landscape"**

___ - Yes (Next Recommended Job(s) to be completed)

Next Recommended Job(s) (to be completed by Coach/Supervisor) If High Potential or Development Code is I, C, X or if Job Change Priority.

Foreign Service Employee (FSE) Assignment Candidate in Next 12 Months (to be completed by Coach/Supervisor)

Employee Comments

Learning the Environmental Administrator role provided excellent challenges for me during the last quarter of 2000. I see valuable opportunities for both my own interests and growth as well as for 3M. I'm looking forward to accomplishing several achievement milestones during 2001 such as 50%+ PET reclamation and improving copper recycling sales. Not the least of my opportunities is coordinating and leading refrigerant management system improvements.

Primary Coach/Supervisor Comments

This is a relatively new position for Debbie and 3M Columbia. She joined the group late in the 3rd quarter of 2000 and she has focused on understanding the expectations of this postion and and methods for achieving these expectations. She as worked successfully with Microflex work centers, the warehouse and vendors to initiate a polyester pilot project. This is a good example of Debbie's ability to work with a varity of groups and a good foundation to build on in 2001 .These skills will be essential for Debbie to achieve full implementation of the polyester recycle projram and implementation of a refrigeration management plan.

Secondary Coach/Supervisor Comments

Next Level Management Comments

I believe the Environmental Administrator role is a good fit for Debbie and 3M. There is some vital work to be done here recycling waste and the refrigerant coordination. Debbie has the skills to interface effectively with both internal plant personnel and the external contacts required.

Signatures (will be filled in by the system when form is approved)

Primary Coach/Supervisor
Bill D. Moore/HE-Columbia/3M/US
03/23/2001 11:57:13 AM

Next Level Management
Larry Wall/HE-Columbia/3M/US
03/22/2001 03:50:58 PM

APPENDIX H

Excerpt
Deposition Testimony of
Larry C. Thomason

[Dated November 18, 2002]

Dale W. Harmon, et al. vs Minnesota Mining, et al. 11/18/02

[p.8]

that point.

Q. Talking about job redundancy in the salaried workforce, did you establish or did anyone establish in writing the criteria for measuring job redundancy or determining if there were job redundancies?

A. Not that I recall, if there was any written documentation.

Q. Do you know as you sit here today how that was determined or how job redundancies were determined by the plant managers?

A. No.

Q. Did you give them any directions as to how to do that?

A. No.

Q. Specifically what were your directions to either the plant manager or the various plant managers at Columbia for determining job redundancy?

A. That was left to the discretion of the plant.

Q. Did you give them any direction as to the 10 percent that you just described?

A. I only gave direction for job redundancies to match the expense reduction target.

* * *

APPENDIX I

Excerpt
Deposition Testimony
of Larry Wall

[Dated October 23, 2002]

[p.25]

Q. Okay. How did you go about determining which positions were redundant?

A. Well, pretty much just looking at all the [p.26] positions that I had in my group and then trying to do an analysis of what was the function of those jobs and what would happen if those were eliminated. You know, what would be the critical nature of the services that wouldn't be provided or what impact would that have.

Q. Okay. And the plant staff meetings where the reduction was discussed, did anyone ever raise the possibility of making the reductions based on merit?

A. That may have been discussed --

Q. Okay.

A. -- as this process was evolving.

Q. But the final determination was that the reductions would not be based on merit. They would be based on redundancy?

A. Right.

Q. Do you remember who in the plant staff -- were there any folks in the plant staff that advocated making the reductions based on merit?

A. I don't believe so.

Q. Okay. Do you know who raised that possibility among the plant staff?

A. No.

* * *

[p.35]

A. Right.

Q. Did you do any kind of ranking when you analyzed these positions in terms of this is the most redundant, this is the second most redundant, this is the third most redundant, etcetera?

A. No.

Q. Okay. Was there anyone else besides the three employees who were listed or who were eliminated that you seriously considered putting on the list?

A. No.

Q. Okay. Did you ever have any thoughts or considerations that Tom Singer's position might be redundant?

A. No.

Q. Okay. So, this wasn't a situation where you -- it was a close call. The three folks that were eliminated kind of stood out in terms of having a redundant position.

A. Well, they did to me.

* * *

APPENDIX J

Email from Larry Wall to Mike Potter
re: Salaried Reductions

[Dated March 6, 2001]

Larry Wall
To: Mike W. Potter/HE-Columbia/3M/US@3M-Corporate
03/06/01 01:00 cc: HE-Staff
PM Subject: Salaried Reductions

In an effort to reduce the salaried staffing and the associated costs in Plant Engineering/Site Services I have identified three positions that can be reduced from a total organization of 21 salaried persons. These reductions are possible because of the lower level of business in the plant and the lower number of personnel of contract and regular. The tasks that have been done by these three persons and will continue to be required will be reassigned to others.

Each of these positions are unique jobs. They are as follows.

Plant Engineering Technician/Planner-- Paul Blakemore
These duties will be assigned to various maintnenance craft.

Environmental Administrator-- Debbie Stidham
These duties will be assigned to other plant engineering staff; some salaried and some hourly. The effort to implement the EMS, Environmental Management System was completed successfully in 2000 and requires only maintenance now. The

progress on waste recycling may not be made as quickly although we will continue the effort here.

Industrial Hygiene Technologist -- C.J. Welch
The lower number of people in the plant, lower production activity and the progress made in 2000 by the Industrial Hygiene group with Doug Meyer allows us to eliminate this position.

Please advise if further explanation is required.

APPENDIX K

Excerpt
Deposition Testimony of
Deborah Stidham

[Dated April 29, 2003]

[p.9]

A. Yes.

Q. Okay. Why do you believe that the termination of your employment in 2001 was based on your age?

A. It's very clear that 96 percent of the 16 employees were over the age of 40. And in my [p.10] own case I know that significant portions, if not 100 percent of the job that I was doing, is now being done by an employee that is much younger than myself.

Q. Any other facts that you have that leads you to believe that the termination of your employment was based on your age?

A. Could you ask me specifically? There are several things that come to my mind.

Q. And what I want you to do now is list everything that comes to your mind or that you believe shows to you that the reason that you're no longer employed by 3-M is because of your age.

A. There were some specific facts that came about months before I was told on April 23rd of 2001 that my job was being eliminated. On that day I couldn't think of them. But then after a few weeks I got to thinking back about the situation with the retirement, the pension benefits.

There had been a push for all employees that currently worked at 3-M to change to a different pension plan. However, the employees that worked there before did have a choice to

* * *

[p.26]

Q. Who is the younger person that you say is currently doing your job?

A. Rebecca Hyde.

Q. How old is Rebecca Hyde?

A. In her 20's. I don't know her exact age. May be as old as very early 30's. But I would say she was in her late 20's.

Q. And on what do you base that conclusion?

A. Just her appearance.

Q. What is Rebecca Hyde's position presently? Let's do it as of today. What is her position at the company?

A. Well, I don't work there any longer so I can't tell you exactly. I just know she's doing my environmental administration duties. And as far as -- there is something

called the Green Belt Program. And they are trying to take programs to show that the company is reducing costs and increasing economic benefit to the company. And this particular reducing of waste and recovery is her main position. That's my understanding. I haven't seen her job description.

Q. All right. And so my am I understanding you correctly to say that she is working on waste

* * *

[p.150]

now.

Q. You say that you were thrown out. But, yet you had the opportunity to stay working at 3-M, right?

A. I could have taken a second or third shift job and worked in production.

Q. That's right.

A. At about approximately half the pay.

Q. Which is more than you're making now, right?

A. This is true.

Q. And for whatever reason you came to the personal choice that it was better for you to leave the employment of 3-M than to work there as a production worker.

A. Yes.

APPENDIX L

Excerpt
Deposition Testimony of
Bill Moore

[Dated May 14, 2003]

Q. Had the project that she would have as refrigerant coordinator -- had that gotten off the ground at the time she was reduced as an employee?

A. She had done a little bit of work there. But, that was not a high profile issue that she worked on.

And by high profile I mean it wasn't something that was a lot of content in that that she was providing.

So, probably the best way to answer your question is, I'd say no, it's not something that she really totally engaged in.

Q. What were those duties as refrigerant coordinator? I mean what specifically was part of that project?

A. That was something that I was learning about, too.

Q. Okay.

A. Okay. So, that was something that I only got very brief exposure to.

Realize that our refrigerant use is similar to an office building. Okay? We're not a large refrigerant user like a food processing plant or somebody. So, the types of things I [p.51] believe that we need to do are track our usage. Identify if we have any excessive losses -- similar to maybe what you would do in your car, you know, for refrigerant.

Q. Who tracks usage and identifies excessive losses today?

A. So, Terry Smith is our refrigerant coordinator. The specific things that she's doing relative to that refrigerant -- I'm not aware.

Q. Okay. Do you have Exhibit 20 in front of you, the interrogatories?

A. Exhibit 20?

Q. Yes, sir.

A. I'll look for it.

MS. MAHONEY: It's right here.

THE WITNESS : Okay.

Q. (By Mr. Schappe) I'm going to direct your attention to Page 4 and 5. In Interrogatory number 4 we asked for -- as to the duties that Mrs. Stidham has performed, what are the duties still performed and who is performing that today?

APPENDIX M

Excerpt
Response to Plaintiff's Request for Admissions Directed to Defendant 3M

[Filed June 5, 2003]

[p.2]

REQUEST NO. 2: Of the personnel terminated as part of the reduction of force by Defendant at its Columbia plant on April 23, 2001 fifteen (15) of the personnel that were terminated were over the age of forty (40).

RESPONSE: Defendant 3M states that this Request is untimely pursuant to the Court's Order dated February 3, 2003. Pursuant to that Order, "discovery is extended until June 2, 2003." Plaintiff's Request for Admissions Directed to Defendant were served by mail on May 16, 2003. Pursuant to the Federal Rules of Civil Procedure, this discovery was not served in time to be completed by the discovery deadline, and as a result, Plaintiffs Request for Admissions Directed to Defendant are untimely.

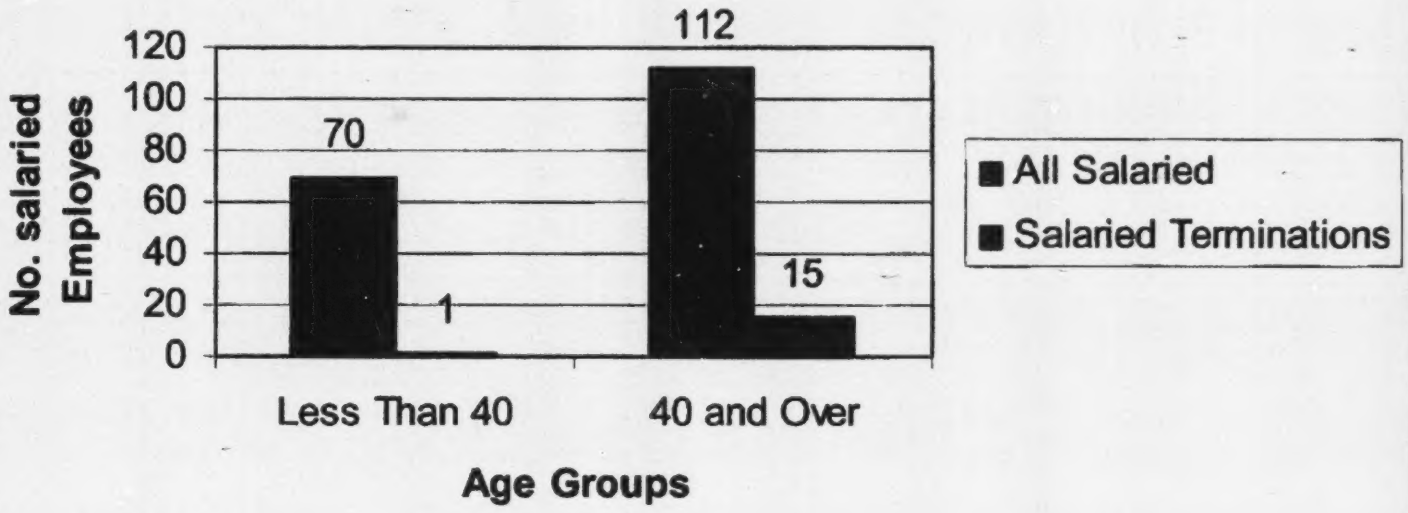
Defendant 3M admits that of the sixteen salaried positions that were eliminated at 3M's Columbia facility during the period April to July 2001, fifteen of the employees who held those positions were over the age of 40. Further answering, plaintiff is referred to 3M's Answer to Plaintiff's Complaint at ¶ 28.

APPENDIX N

Appellant's Petition for Panel Rehearing
Tables A and B

See Fold Out Exhibits

3M columbia Salaried Terminations
vs.
All Salaried by Age: 4/23/01



3M Columbia % Salaried Terminations
vs.
All Salaried by Age: 4/23/01

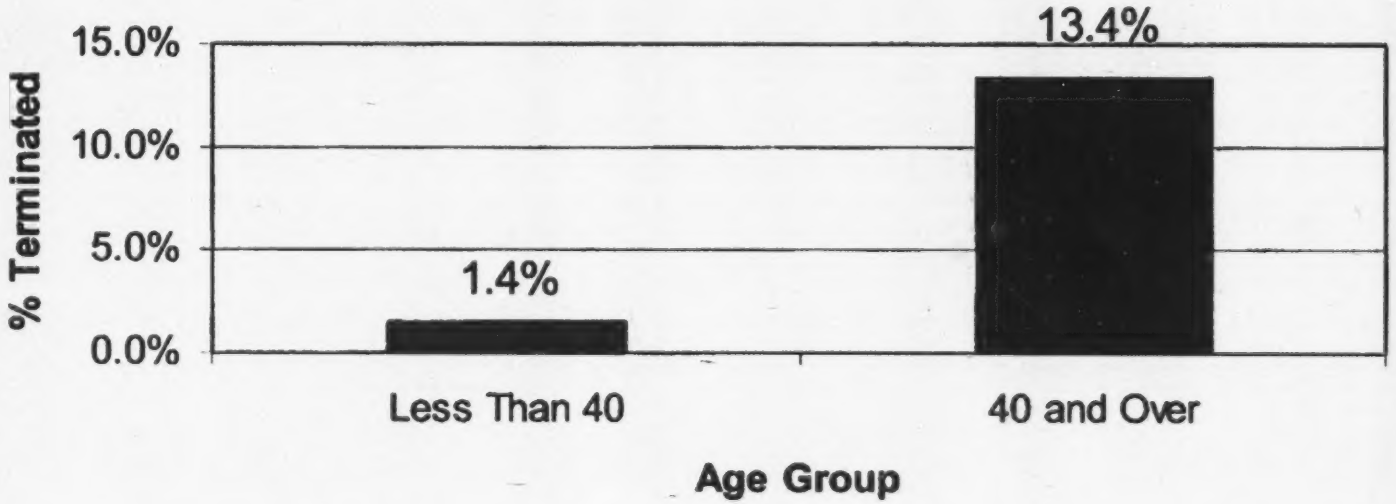
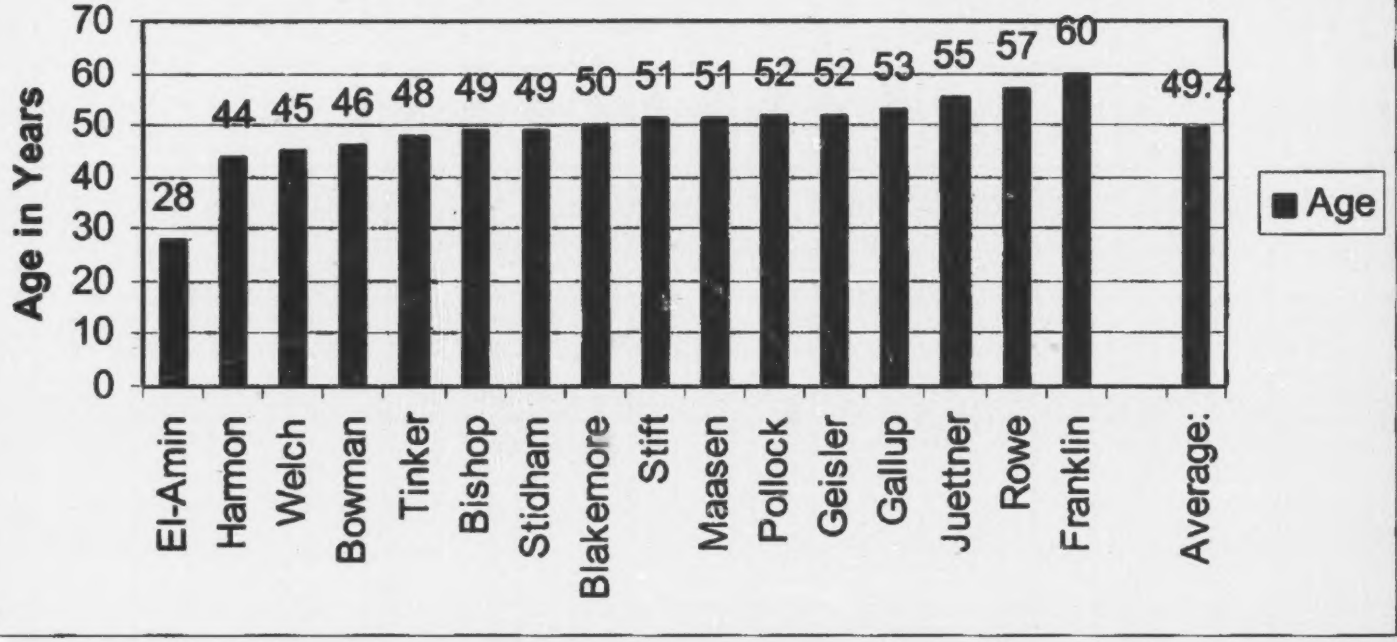
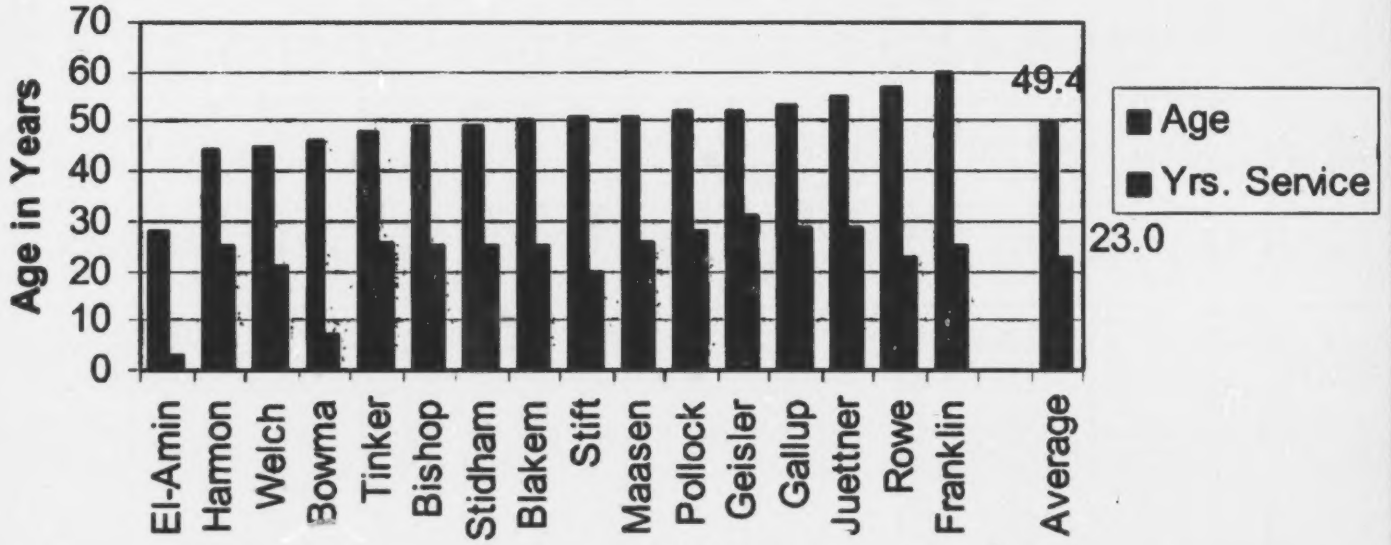


Table A

3M Columbia Salaried Terminations by Age: 4/23/01



3M Columbia Salaried Terminations
Age vs. Years of Service



Age, in addition to years of service, indicate the targeting of high potential pension earners in the protected class.

Table B

FILED
SEP 23 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-122

In the Supreme Court of the United States

Deborah Stidham,

Petitioner,

v.

Minnesota Mining and Manufacturing, Inc.,
d/b/a 3M Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONSE IN OPPOSTITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent 3M Company ("3M") eliminated Petitioner Deborah Stidham's ("Stidham") environmental administrator position in connection with a reduction-in-force in 3M's Columbia, Missouri plant in early 2001. Stidham had transferred into the environmental position in September 2000. 3M did not have an environmental administrator position at the Columbia plant prior to September 2000 and has not had one since Stidham left. 3M offered her and others whose jobs were eliminated a severance package, which Stidham declined. 3M also offered to maintain Stidham's employment by transferring her to another position at the same facility, which she refused.

Stidham asserted that 3M's elimination of the environmental administrator position constituted age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623. The District Court found Stidham failed to present evidence sufficient to create a genuine issue of fact as to whether 3M discriminated against her based on age. The Eighth Circuit Court of Appeals affirmed, 399 F.3d 936 (8th Cir. 2005), and denied Stidham's petition for rehearing *en banc*.

Stidham's Petition raises the following issues:

I. In an age discrimination case involving a reduction-in-force, did the Eighth Circuit Court of Appeals properly require Stidham to produce *prima facie* evidence that age was a factor in the selection of her position for elimination?

II. Is the Eighth Circuit Court of Appeals' *McDonnell Douglas* analysis in conformance with precedent established by this Court and the other circuit courts?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent 3M Company states that it is a Delaware corporation whose shares are publicly traded. 3M does not have a parent corporation. There is no publicly held corporation that owns 10% or more of 3M's stock.

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STATEMENT OF THE CASE

The opinions of the Court of Appeals for the Eighth Circuit and the U.S. District Court for the Western District of Missouri set forth the pertinent undisputed facts regarding Stidham's claim. Briefly, in 2001, 3M implemented a reduction-in-force in response to adverse business conditions at the time. Stidham claims that 3M eliminated her position because of her age.

Pursuant to Supreme Court Rule 15.2, 3M respectfully submits the following Clarification of the Record to correct the misstatements that pervade Stidham's Statement of the Case.

I. Clarification of the Record.

Several of the "facts" Stidham states in the Petition are simply wrong.

A. Stidham was not a supervisor or manager.

It is undisputed Stidham occupied a non-supervisory, non-management administrator position until her employment terminated in 2001. 3M created the environmental administrator position in September 2000, and Stidham was the first (and only) person to hold that job at the Columbia plant. (*See* Respondent's Appendix at A-8, Answer to No. 6.)

B. A bona fide reduction-in-force occurred, and 3M was not required by contract to offer Stidham another job.

Notwithstanding her admission that 3M implemented a reduction-in-force, Stidham now questions whether such a reduction ever occurred. (*Compare* Respondent's Appendix A-2, Page 61 *with* Petition at 4.) Nevertheless, it remains undisputed that in late 2000, the United States' economy

experienced a sharp recession. In order to meet its business requirements, 3M, like many other employers, implemented a number of cost-cutting measures, including the elimination of seventy production positions based upon low seniority and sixteen salaried positions based upon redundancy. Redundant positions were defined as those that 3M could do without altogether or those whose essential functions could be transferred to a non-redundant position or positions. (*See* Petitioner's Appendix at 7a-9a.)

3M's cost-cutting measures required it to eliminate three positions in the Columbia plant's engineering department. In an effort to suggest age bias, Stidham states that she and two others over the age of forty were the only employees in her department who were seriously considered for job elimination, and she further states there were six salaried employees outside of the protected class who were "never considered" for job elimination. In her vigor to push her theory before this Court, Stidham has offered only part of the story. Prior to the reduction, twenty-two people, including Larry Wall, worked in the plant engineering department. In assessing his department, Wall determined that the environmental administrator position held by Stidham was one that was no longer needed. Nineteen people remained after the reduction, and thirteen of them were over 40 years of age. (*See* Petitioner's Appendix at 22a.) Seven of these individuals were older than Stidham, including Wall himself, who was 58 years old. (*Id.*) So, following Stidham's logic, in addition to the six individuals under forty who were supposedly never considered, there were thirteen people *over forty* who were not considered either.

Moreover, 3M offered to "bump" a lower seniority production employee to create a job opening for Stidham. (*See* Respondent's Appendix at A-2.) Contrary to Stidham's assertion in her Petition, 3M was not required to do this under

the terms of a "contract" or "collective bargaining agreement." Rather, 3M offered to bump a lower seniority production employee in recognition of Stidham's longer service with 3M and in an effort to save her employment. Moving into a production position obviously would have allowed Stidham to maintain her 3M employment. This undisputed fact fatally undercuts Stidham's claim that she lost her employment because of her age.

C. A major part of the environmental administrator function was completed before Stidham's position was eliminated.

A major part of Stidham's responsibilities during her short tenure as environmental administrator involved setting up a polyester recycling program. (*See* Respondent's Appendix at A-3; A-4 to A-5; A-7, Answer to No. 1.) Stidham completed that project prior to leaving 3M and the Columbia plant since has integrated responsibility for maintaining that program into its overall manufacturing operation. (Respondent's Appendix at A-5; A-6; A-7 to A-8, Answer to No. 4.) As such, 3M's Columbia, Missouri plant has operated without an environmental administrator since Stidham's employment ended, just as it operated without one for the decades before Stidham took that position. (Respondent's Appendix at A-6; A-8, Answer to No. 6.)

Aside from the polyester recycling program, Stidham held some refrigerant coordinator duties. (Respondent's Appendix at A-7 to A-8, Answer to No. 4.) These duties, which occupied only a small percentage of Stidham's time, were incorporated into the position held by Terri Smith who was 44 years old at the time of the reduction. (*Id.*; *see also* Petitioner's Appendix at 22a.) Terri Smith was less than five years younger than Stidham, not eight years as Stidham

contends in her Petition. (*See* Petition at 4 and Petitioner's Appendix at 22a.)

In addition, Stidham has misinformed this Court that a younger employee named Rebecca Hyde took over "the majority" of her environmental administrator functions. (Petition at 3.) Stidham admitted in her deposition that she has no facts to support this contention. (*See* Respondent's Appendix at A-1 to A-2.) Moreover, Stidham has no reason to believe 3M could have eliminated Rebecca Hyde's job and transferred her responsibilities to Stidham. (*Id.*)

II. The Decisions Below.

Both the Eighth Circuit Court of Appeals and the District Court adhered to this Court's requirement that a person seeking to establish a *prima facie* case of age discrimination produce "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion.'" *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), *quoting Teamsters v. United States*, 431 U.S. 324, 358 (1977). Both courts found Stidham failed to produce such evidence to establish her *prima facie* case. Both courts considered a wide variety of direct, statistical and circumstantial evidence and properly concluded that none of the evidence supported a reasonable inference that Stidham's age was a factor in 3M's decision to eliminate her position.

The district court applied the familiar four-factor test this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for determining whether a plaintiff has proven a *prima facie* case. The district court considered Stidham's arguments and evidence and held that Stidham's allegation, standing alone, that her discharge was based on discriminatory animus was not sufficient to establish a *prima*